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# Evidence-Based, Constitutionally-Sound Approaches to Reducing Gun Fatalities in Violent Relationships

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# EVIDENCE-BASED, CONSTITUTIONALLY-SOUND APPROACHES TO REDUCING GUN FATALITIES IN VIOLENT RELATIONSHIPS

BY SARAH MARTIN\*

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\* Juris Doctor candidate, Belmont University College of Law, 2019; M.P.A., Tennessee State University, 2012; B.S., Tennessee Technological University, 2005. This note is dedicated to the memory of the many victims of domestic violence who have lost their lives at the hands of their partners. But this note also is dedicated to those who stayed and survived, those who left and returned, and those who endeavored to live their lives free from abuse: You are strong. You are valued. You are enough. *“Our job is not to deny the story, but to defy the ending—to rise strong, recognize our story, and rumble with the truth until we get to a place where we think, Yes. This is what happened. And I will choose how the story ends.”* – Brené Brown

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## INTRODUCTION

Our country is plagued by a uniquely American epidemic whereby women<sup>1</sup> are shot to death by partners who say they love them.<sup>2</sup> While domestic violence is a complex matter and preventing domestic abuse and domestic violence-related fatalities seems like a daunting task, the first steps are relatively simple: (1) close persistent gaps in existing firearms laws that allow dangerous abusers to obtain and continue to possess firearms, and (2) enforce existing laws regarding firearms. Ensuring that domestic abusers do not have access to deadly weapons is an evidence-based strategy to protect vulnerable victims<sup>3</sup> of an otherwise seemingly unending cycle of domestic abuse, and therefore limiting abusers' access to guns is necessary to reducing the number of women murdered in the United States each year.<sup>4</sup> Enacting a comprehensive set of strategies to prevent abusers from obtaining firearms, as well as to disarm abusers who possess illegal guns, will not just reduce the number of women who are murdered by their abusers—it will make our communities safer.<sup>5</sup>

To advance this objective, this note advocates six constitutionally-sound approaches to keep guns out of the hands of domestic abusers. In support of these measures, this note begins with an overview of the pervasive cycle of domestic violence. Part I discusses the prevalence and impact of domestic violence, how the cycle of violence is manifested, and some of the strategies and challenges of intervention. The goal of Part I is to provide a foundation to understand the unbelievably complex nature of domestic abuse, how far American society has come in addressing domestic violence, and how far there is yet to go.

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1. Because women are disproportionately affected by domestic violence, *see infra* Part I, this note will focus more on victims who are women, which is not intended to discount the many men who also experience domestic abuse.

2. *See generally* MAYORS AGAINST ILLEGAL GUNS, GUN LAWS AND VIOLENCE AGAINST WOMEN (n.d.), [http://libcloud.s3.amazonaws.com/9/e9/e/1726/1/Gun\\_Laws\\_and\\_Violence\\_Against\\_Women.pdf](http://libcloud.s3.amazonaws.com/9/e9/e/1726/1/Gun_Laws_and_Violence_Against_Women.pdf).

3. This note uses “victim” and “survivor” interchangeably.

4. *See infra* Parts II and IV.

5. *See generally* Amy Karan & Helen Stampalia, *Domestic Violence and Firearms: A Deadly Combination, The Juxtaposition of Federal and Florida Laws*, 79 FLA. B.J. 79 (2005); MAYORS AGAINST ILLEGAL GUNS, *supra* note 2.

Part II demonstrates the link between firearms and lethality in violent relationships. Part II also addresses some of the risks that a volatile intimate relationship poses to bystanders.

Part III explains the current state of the relevant federal and state gun laws with respect to domestic abusers. Part III explores various unsuccessful constitutional challenges to certain federal statutory provisions, including the line of jurisprudence regarding, for example, the provisions' constitutionality under the Second Amendment and how the provisions have been interpreted in recent landmark decisions.

Finally, Part IV explores constitutionally-sound, evidence-based avenues for reducing domestic violence fatalities. Those avenues are as follows: (A) broaden the statutory definition of "intimate partner" to include casual dating partners; (B) ensure respondents to temporary orders of protection are barred from possessing guns; (C) include stalking as a prohibiting offense; (D) mandate that state and local officials report prohibitive offenses to the federal databases, streamline reporting by providing guidance on reporting to local officials, and, in states that are reliant only on the federal databases for background checks, implement state or local agencies ("Points of Contact" or "POCs") through which background checks can be conducted; (E) require background checks on all gun purchases, including transfers from private sellers; and (F) implement protocols to ensure that abusers relinquish illegal firearms.

## I. DOMESTIC VIOLENCE: A PERVASIVE CYCLE

### A. Prevalence and Impact

In the United States, women experience domestic violence at disproportionate rates, with nearly 1 in 4 (22.3%) women and 1 in 7 men (14.0%) aged 18 and older having experienced severe physical violence by an intimate partner.<sup>6</sup> The rate of severe physical violence between lesbian and gay partners is higher (29.4% and 16.4%, respectively).<sup>7</sup> Approximately 1 in 6 women (16.4%) and 1 in 14 men (7.0%) also experience sexual violence by an intimate partner during their lifetimes.<sup>8</sup> One in 6 women (16.2%) and 1 in 19 men (5.2%) in the United States have experienced

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6. See Matthew J. Breiding et al., *Prevalence and Characteristics of Sexual Violence, Stalking and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, CTRS. FOR DISEASE CONTROL & PREVENTION, 63 MORBIDITY & MORTALITY WKLY. REP. (NO. 8) 1, 2 (2014), <https://perma.cc/8JQD-NWXX>.

7. MIKEL L. WALTERS ET AL., *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION 2* (Nat'l Ctrs. for Injury Prevention & Control of the Ctrs. for Disease Control & Prevention 2013), <https://perma.cc/6R5K-SAXW>.

8. *Prevent Domestic Violence in Your Community*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://perma.cc/C7VJ-2MD4> (last updated Oct. 2, 2017).

stalking to the degree of feeling “very fearful” or believing that “they or someone close to them would be harmed or killed.”<sup>9</sup>

Given these grave statistics, it is unsurprising that the Centers for Disease Control and Prevention characterizes domestic violence as a public health problem.<sup>10</sup> Domestic violence is the most common cause of injury for women ages 18 to 44,<sup>11</sup> and domestic violence leads to an increased incidence of chronic disease.<sup>12</sup> More specifically, abused women are 70% more likely to have heart disease, 80% more likely to experience a stroke, and 60% more likely to develop asthma.<sup>13</sup> Domestic violence also poses unique risks to pregnant women because pregnant women who experience abuse during pregnancy are more likely to delay prenatal care, more likely to have poorer pregnancy outcomes, such as low birthweight babies, premature labor, and fetal trauma, and more likely to engage in unhealthy maternal behaviors.<sup>14</sup> Moreover, in a 2012 survey of 25 cities, 28% of mayors cited domestic violence as a leading cause of homelessness among families with children.<sup>15</sup>

Additionally, a stunning amount of domestic violence is lethal,<sup>16</sup> and approximately 85% of intimate partner homicide victims are women.<sup>17</sup> “Femicide,” or the homicide of women, is the leading cause of death among African American women aged 15 to 45 and the seventh leading cause of premature death among women overall.<sup>18</sup> In 2015 alone, 3,519 girls and women in the United States were victims of homicide, and nearly half were killed by a current or former male intimate partner.<sup>19</sup>

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9. MICHELE C. BLACK ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 2 (Nat’l Ctr. for Injury Prevention & Control Ctrs. for Disease Control & Prevention 2011), at [https://www.cdc.gov/violenceprevention/pdf/nisvs\\_report2010-a.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf).

10. See Breiding, *supra* note 6.

11. Robert Pearl, *Domestic Violence: The Secret Killer That Costs \$8.3 Billion Annually*, FORBES (Dec. 5, 2013, 1:00 PM), <https://perma.cc/T6G5-X34B>.

12. *Id.*

13. *Id.*

14. Jana L. Jasinski, *Pregnancy and Domestic Violence: A Review of the Literature*, 5 TRAUMA, VIOLENCE, & ABUSE 47, 48 (2004), <http://journals.sagepub.com/doi/pdf/10.1177/1524838003259322>.

15. THE U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 26 (2012), <https://perma.cc/7H8C-NQK9>.

16. ARKADI GERNEY & CHELSEA PARSONS, WOMEN UNDER THE GUN: HOW GUN VIOLENCE AFFECTS WOMEN AND 4 POLICY SOLUTIONS TO BETTER PROTECT THEM 1 (Ctr. for Am. Progress 2014), <https://perma.cc/KV27-WE26>.

17. Carolina Diez, et al., *State Intimate Partner Violence–Related Firearm Laws and Intimate Partner Homicide Rates in the United States, 1991 to 2015*, ANNALS OF INTERNAL MED. (Sept. 19, 2017), <https://perma.cc/EA86-N44G>.

18. Jacquelyn C. Campbell et. al, *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089, 1089 (2003), <https://perma.cc/6UDF-EF9A>.

19. Emiko Petrosky et al., *Racial and Ethnic Differences in Homicides of Adult Women and the Role of Intimate Partner Violence—United States, 2003–2014*, CTRS. FOR DISEASE CONTROL & PREVENTION, 66 MORBIDITY & MORTALITY WKLY. REP. (No. 28) 741, 741 (2017), <https://perma.cc/8X4G-HQ2X>.

Moreover, domestic violence has a staggering impact on the economy.<sup>20</sup> For instance, approximately 75% of domestic violence victims report being harassed at work by their partners, and victims of domestic violence also experience a “broad range of emotional consequences,” such as depression, anxiety, and low self-esteem, all of which contribute to lost employee productivity.<sup>21</sup> Considering that domestic violence victims “use the emergency room more often, visit physicians more often, and use more prescription drugs than persons without violence,” a domestic violence victim incurs \$1,775 more in annual medical costs on average than an individual who is not abused, delivering a large financial blow to employers that provide health insurance to employees.<sup>22</sup>

Employers lose an estimated \$100 million in lost wages, paid sick leave, and absenteeism linked to domestic violence.<sup>23</sup> Due to absenteeism, high medical costs, and lost productivity, it is estimated that domestic violence costs employers \$3 to \$5 billion every year.<sup>24</sup> The total estimated cost of domestic violence to the American economy is \$8.3 billion annually, which includes a whopping 8 million lost paid work days.<sup>25</sup>

## B. Manifestation

The United States Department of Justice defines domestic violence as “a pattern of abusive behavior in any relationship that is used by one partner to gain or maintain power and control over another intimate partner.”<sup>26</sup> While many may assume domestic abuse is limited to physical abuse, an abuser may attempt to control a partner through “physical, sexual, emotional, economic, or psychological actions or threats.”<sup>27</sup> Abusers often “intimidate, manipulate, humiliate, isolate, frighten, terrorize, coerce, threaten, blame, hurt, injure, or wound” their victims.<sup>28</sup>

The National Coalition Against Domestic Violence notes that abusers are not always easy to spot, particularly in the early stages of a relationship.<sup>29</sup> Abusive relationships often start like any other relationship and then gradually intensify, with the abuser becoming more aggressive and controlling over time.<sup>30</sup> For example, an abuser may start the cycle of abuse

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20. See generally Pearl, *supra* note 11.

21. P'SHIP FOR PREVENTION, DOMESTIC VIOLENCE AND THE WORKPLACE 1 (2002), <https://perma.cc/T8XL-UN6C>.

22. *Id.*

23. *Id.*

24. See *id.*

25. Pearl, *supra* note 11.

26. U.S. DEP'T OF JUSTICE, *Fact Sheet: Domestic Violence*, OFFICE OF JUSTICE PROGRAMS (Nov. 2011), <https://perma.cc/QRM8-JS6Q> (last updated Apr. 11, 2018).

27. *Id.*

28. *Id.*

29. *Learn More: What is Domestic Violence?*, NAT'L COALITION AGAINST DOMESTIC VIOLENCE, <https://perma.cc/N2ST-YMPR> (last visited Jan. 26, 2018).

30. *Id.*

by becoming jealous or accusing the victim of cheating, monopolizing the victim's time, or stalking the victim's online activity.<sup>31</sup> The abuser may then escalate to interfering with the victim's work or schooling, such as harassing the victim at work or school or keeping the victim up late at night to affect the victim's performance.<sup>32</sup> The abuser may start to control access to finances; control where the victim goes, who the victim sees, or what the victim wears; criticize, embarrass, or shame the victim; destroy property; or use the children against the victim.<sup>33</sup> The relationship may become even more volatile when the abuser begins brandishing weapons; refusing to use protection during sex or sabotaging contraceptives; threatening to hurt or kill friends, family members, or pets; or pressuring or forcing the victim to engage in sexual activity against his or her will.<sup>34</sup>

### C. Intervention Strategies & Challenges

Domestic violence went largely unaddressed by our legal system until the 1960s and 1970s, when the "battered women's movement" gained traction.<sup>35</sup> During these years, activists challenged the handling of domestic violence cases, questioned the allocation of public resources, and elevated public concern for victims, in an ultimate effort to work toward better protecting and serving survivors and holding abusers accountable.<sup>36</sup>

Over the last several decades, the needle has moved considerably.<sup>37</sup> For instance, today many jurisdictions have enacted mandatory arrest laws that eliminate or reduce an officer's discretion on the scene of a domestic violence incident—that is, where the officer can identify the primary aggressor, the officer must arrest him or her.<sup>38</sup> Some jurisdictions also have

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31. *Id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. Bethany A. Corbin, *Goodbye Earl: Domestic Abusers and Guns in the Wake of United States v. Castleman—Can the Supreme Court Save Domestic Violence Victims?*, 94 NEB. L. REV. 101, 112 (2015).

36. *Id.*

37. *See generally id.*

38. *See, e.g.*, TENN. CODE ANN. § 36-3-619 (2018):

(a) If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or felony, or was committed within or without the presence of the officer, the preferred response of the officer is arrest.

(b) If a law enforcement officer has probable cause to believe that two (2) or more persons committed a misdemeanor or felony, or if two (2) or more persons make complaints to the officer, the officer shall try to determine who was the primary aggressor. Arrest is the preferred response only with respect to the primary aggressor. The officer shall presume that arrest is not the appropriate response for the person or persons who were not the primary

specialized law enforcement and prosecution teams dedicated to investigating and prosecuting domestic violence.<sup>39</sup> Other jurisdictions have opened family justice centers dedicated to strengthening offender accountability and improving outcomes for survivors by connecting them with services in a one-stop-shop environment.<sup>40</sup> Orders of protection have become a more valuable tool for victims and law enforcement, as an order is a means of documenting abusive incidents and can yield evidence for a later trial.<sup>41</sup> Of equal importance, in all 50 states, a violation of an order of protection now results in automatic criminal liability, which provides a “potent mechanism” for police to intervene in abusive situations.<sup>42</sup>

However, note what these advances have in common: they are largely reactionary.<sup>43</sup> In response, some jurisdictions have implemented a tool called a “Lethality Assessment Program” (“LAP”), adapted from Jacqueline Campbell’s Danger Assessment,<sup>44</sup> to help first responders assess a particular victim’s risk level and respond appropriately, such as referring the victim to advocacy programs and services.<sup>45</sup> For example, increased severity or frequency of the abuse, possession of a gun, strangulation, physical abuse during pregnancy, and threats to commit suicide are some factors that may indicate an increased risk of lethality.<sup>46</sup> Under the LAP, a

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aggressor. If the officer believes that all parties are equally responsible, the officer shall exercise such officer’s best judgment in determining whether to arrest all, any or none of the parties.

(c) To determine who is the primary aggressor, the officer shall consider:

- (1) The history of domestic abuse between the parties;
- (2) The relative severity of the injuries inflicted on each person;
- (3) Evidence from the persons involved in the domestic abuse;
- (4) The likelihood of future injury to each person;
- (5) Whether one (1) of the persons acted in self-defense; and
- (6) Evidence from witnesses of the domestic abuse.

39. See, e.g., METRO. GOV’T OF NASHVILLE & DAVIDSON CTY. OFF. OF FAM. SAFETY, 2016 ANNUAL REPORT (2016), <https://perma.cc/H2PF-J8MP>.

40. See *generally Affiliated Centers*, FAMILY JUSTICE CENTER ALLIANCE, <https://perma.cc/Y5ZG-44V8> (last visited Jan. 26, 2018).

41. Corbin, *supra* note 35, at 115.

42. *Id.*

43. See *id.* at 116.

44. JACQUELINE CAMPBELL, DANGER ASSESSMENT (Johns Hopkins School of Nursing 2003), <https://perma.cc/TW4D-6KFN>.

45. *Maryland’s Lethality Assessment Program: From Research into Practice*, BATTERED WOMEN’S JUSTICE PROJECT (Dec. 2009), <https://perma.cc/DYB4-EKAM>.

46. Campbell, *supra* note 44.



“high danger victim” may require additional follow up by law enforcement, an order of protection, or a warm transfer<sup>47</sup> to a victim advocate.<sup>48</sup>

While domestic violence cuts across all races, ages, ethnicities, sexual orientations, and economic statuses, some demographic segments face more barriers to reporting abuse, leaving an abusive relationship, or obtaining help than others.<sup>49</sup> For instance, LGBT victims struggle due to legal definitions that exclude same-sex couples,<sup>50</sup> the potential to “out” oneself when seeking help, a lack of LGBT-specific or LGBT-friendly resources, or low confidence in the criminal justice system.<sup>51</sup> Access to rights and services may also be complicated by factors such as ethnicity, geographic isolation, language barriers, cultural intolerance, disability, or lack of appropriate social supports.<sup>52</sup> Victim advocates cite many other reasons victims do not leave their abusers, such as economic dependence on the abuser, children or family members, religious beliefs, loyalty, love, pity, fear of being alone, denial, guilt, shame, or embarrassment.<sup>53</sup>

Of course, one of the greatest barriers to leaving an abusive relationship for any victim of domestic violence, but particularly for women, is the risk of being killed at the hands of the abuser.<sup>54</sup> More specifically, women are 70 times more likely to be killed in the two weeks after leaving their abuser than at any other time during the relationship.<sup>55</sup> When a survivor leaves, the abuser has experienced a complete loss of control and often believes he or she has nothing left to lose.<sup>56</sup>

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47. A “warm transfer” is when the officer calls a victim advocate, explains the survivor’s circumstances, and then connects the survivor with the advocate while the officer is still at the scene, thereby preventing the survivor from having to tell his or her story again.

48. See MD. NETWORK AGAINST DOMESTIC VIOLENCE, LETHALITY ASSESSMENT PROGRAMS FOR FIRST RESPONDERS 12 (n.d.), <https://perma.cc/LF48-QFC5>.

49. See *Domestic Violence Doesn’t Discriminate*, NAT’L NETWORK TO END DOMESTIC VIOLENCE, <https://perma.cc/L6BK-TKCP> (last visited Jan. 26, 2018).

50. See generally, e.g., AM. BAR ASS’N COMM’N ON DOMESTIC & SEXUAL VIOLENCE, REPORT TO THE HOUSE OF DELEGATES (n.d.), <https://perma.cc/C3GS-MXVV> (discussing various state laws that, either by express language or ambiguity, deny same-sex partners access to orders of protection).

51. TAYLOR N.T. BROWN & JODY L. HERMAN, INTIMATE PARTNER VIOLENCE AND SEXUAL ABUSE AMONG LGBT PEOPLE: A REVIEW OF EXISTING RESEARCH 3 (Williams Inst. 2015), <https://perma.cc/L8DL-7QWX>.

52. MELISSA HOOK ET AL., MEETING THE NEEDS OF UNDERSERVED VICTIMS VIDEO DISCUSSION GUIDE 1 (U.S. Dep’t of Justice Office for Victims of Crime 2005), <https://perma.cc/F5NL-8FJN>.

53. See, e.g., DOMESTIC VIOLENCE SOLUTIONS, BARRIERS TO LEAVING AN ABUSIVE RELATIONSHIP, DOMESTIC VIOLENCE SOLUTIONS 1 (2018), <https://perma.cc/44N3-YYCT>.

54. Jerry Mitchell, *Most dangerous time for battered women? When they leave.*, THE CLARION-LEDGER (Jan. 28, 2017), <https://perma.cc/ZT4S-S23Y>.

55. *Id.*

56. Sharon L. Gold, Note, *Why Are Victims of Domestic Violence Still Dying at the Hands of Their Abusers? Filling the Gap in State Domestic Violence Gun Laws*, 91 KY. L.J. 935, 940 (2003).

## II. GUNS AND DOMESTIC VIOLENCE: A LETHAL COMBINATION

A key factor in most domestic violence-related homicides is access to firearms.<sup>57</sup> When domestic abusers have access to firearms, they pose an elevated risk to their partners.<sup>58</sup> To put this elevated risk in proper perspective, several studies have shown that, in situations of domestic violence, abusers' access to firearms increases the risk for homicide as much as 5-fold.<sup>59</sup> Unsurprisingly, domestic assaults involving guns are also 12 times more likely to be lethal than those that do not.<sup>60</sup> Additionally, households with guns are almost 8 times more likely to involve a firearm homicide by a family member or intimate acquaintance than homes without guns.<sup>61</sup> Sadly, one out of every four victims who attempt suicide use the gun kept in their homes by their abuser.<sup>62</sup>

An astounding two-thirds of intimate partner homicides in the United States are perpetrated with guns, which are typically kept in the homes where the homicides occur.<sup>63</sup> From 2001 to 2012, 6,410 women were murdered in the United States by an intimate partner using a gun—more than the number of U.S. troops killed in action during both the Iraq and Afghanistan wars.<sup>64</sup> Of these murders, 55% were perpetrated with guns.<sup>65</sup> Significantly for this note's focus, female-victim gun homicides appear to be a uniquely American problem, considering women in the United States are 11 times more likely to be murdered with a gun than are women in other developed countries.<sup>66</sup>

However, the risk of serious injury or death is not limited to the abuser's partner. Abusers who use guns to kill their intimate partners also commonly injure or kill third parties, including children, interveners such as law enforcement, and other bystanders.<sup>67</sup> In fact, one study found that 57% of mass shootings in recent years have started with or involved the shooting of an intimate partner or a family member, and in 29% of those cases, the shooter had a prior domestic violence charge.<sup>68</sup>

## III. GUN LAWS

With the passage of the Violence Against Women Act ("VAWA") and subsequent amendments to the Gun Control Act of 1968, Congress

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57. Gerney & Parsons, *supra* note 16.

58. EVERYTOWN FOR GUN SAFETY, DOMESTIC ABUSE PROTECTIVE ORDERS AND FIREARM ACCESS IN RHODE ISLAND 1 (2015), <https://perma.cc/KRH9-EHTA>.

59. *Id.*

60. Karan & Stampalia, *supra* note 5, at 79.

61. *Id.*

62. *Id.*

63. *Id.*

64. Gerney & Parsons, *supra* note 16.

65. *Id.*

66. MAYORS AGAINST ILLEGAL GUNS, *supra* note 2, at 3.

67. See Karan & Stampalia, *supra* note 5, at 79.

68. MAYORS AGAINST ILLEGAL GUNS, *supra* note 2.

demonstrated that it recognized the deadly combination of guns and domestic violence by making it a federal crime for a domestic abuser to possess a firearm.<sup>69</sup> In fact, Senator Frank Lautenberg stated during debate, “[T]he difference between a murdered wife and a battered wife is often the presence of a gun.”<sup>70</sup> States began to follow suit, adopting statutes mirroring the federal bars, though, as discussed herein, enforcement remains a challenge.<sup>71</sup>

#### A. Relevant Federal Bars to Firearm Possession

Enacted in 1994, 18 U.S.C. section 922(g)(8) prohibits the possession of a firearm by a person who is subject to a protective order meeting certain requirements. The provision states:

It shall be unlawful for any person—

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C) (i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or

(ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury . . .

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which

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69. Gold, *supra* note 56, at 935.

70. EVERYTOWN FOR GUN SAFETY, GUNS AND VIOLENCE AGAINST WOMEN: AMERICA’S UNIQUELY LETHAL DOMESTIC VIOLENCE PROBLEM 5 (2014), <https://perma.cc/YQD9-52HJ>.

71. Díez, *supra* note 17.

has been shipped or transported in interstate or foreign commerce.<sup>72</sup>

In 1996, Congress enacted 18 U.S.C. section 922(g)(9), commonly called the “Lautenberg Amendment,” which prohibits a person convicted of a misdemeanor crime of domestic violence from possessing a firearm.<sup>73</sup> The provision reads:

It shall be unlawful for any person—

(9) who has been convicted in any court of a misdemeanor crime of domestic violence[]

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.<sup>74</sup>

This particular provision is triggered when the underlying offense includes an element requiring proof of the use or attempted use of physical force or the threatened use of a deadly weapon against the victim.<sup>75</sup> The victim must also be a current or former spouse, parent, or guardian of the offender; a person with whom the offender shares a child; a person with whom the offender has cohabitated or is cohabitating as a spouse, parent, or guardian; or a person “similarly situated” to the offender.<sup>76</sup> Guidance from the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) indicates that the “similarly situated” language in the statute requires more than a casual dating relationship between the victim and offender, describing a

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72. 18 U.S.C. § 922(g)(8) (2018).

73. EVERYTOWN FOR GUN SAFETY, *supra* note 70.

74. 18 U.S.C. § 922(g)(9) (2018).

75. 18 U.S.C.A. § 921(33)(A) (West, 2018) is as follows:

(33)(A) . . . the term “misdemeanor crime of domestic violence” means an offense that—

(i) is a misdemeanor under Federal, State, or Tribal law; and  
(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

76. *Id.*

qualifying relationship as “two persons who are residing at the same location in an intimate relationship with the intent to make that place their home.”<sup>77</sup>

Violation of section 922(g)(8) or (9) (the “firearm prohibitions”) is punishable by up to ten years in prison and/or a fine of up to \$250,000.<sup>78</sup> These firearm prohibitions also work in tandem with sections 922(d)(8) and (9), which make it a crime for a seller to sell a gun or ammunition to anyone the seller knows or has reason to believe is a respondent to a qualifying order of protection or has been convicted of a misdemeanor crime of domestic violence.<sup>79</sup> These provisions, sections 922(g)(8) and (9) and sections 922(d)(8) and (9), are “fairly infrequently invoked,” accounting for a mere 937 lead charges in the last 10 years, according to the Department of Justice.<sup>80</sup>

### 1. Challenges in Federal Courts and the Court of Public Opinion Pre-*Heller*

These firearm prohibitions have withstood several constitutional challenges in federal courts. For example, section 922(g)(8) has weathered challenges under the Fifth Amendment’s notice and fair warning provision.<sup>81</sup> For instance, in *United States v. Kafka*, Kafka argued that section 922(g)(8)

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77. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, FEDERAL FIREARMS REGULATIONS REFERENCE GUIDE 38 (2014), <https://perma.cc/XT3T-6UBA>.

78. EVERYTOWN FOR GUN SAFETY, *supra* note 70. In Fiscal Year 2016, the average offender of section 922(g) (and not any additional federal statutory provision) was sentenced to 180 months in prison. U.S. SENTENCING COMM’N, QUICK FACTS: FELON IN POSSESSION OF A FIREARM (2016), <https://perma.cc/R6VT-5Z4Y>.

79. U.S.C. §§ 922(d)(8), (9) (2018) state:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child, except that this paragraph shall only apply to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

(9) has been convicted in any court of a misdemeanor crime of domestic violence.

80. See TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, INC., FEDERAL WEAPONS PROSECUTIONS RISE FOR THIRD CONSECUTIVE YEAR (Nov. 29, 2017), <https://perma.cc/VVS2-2528>.

81. See *United States v. Kafka*, 222 F.3d 1129, 1130-31 (9th Cir. 2000). See also *United States v. Reddick*, 203 F.3d 767, 769-71 (10th Cir. 2000); *United States v. Baker*, 197 F.3d 211, 218-20 (6th Cir. 1999); *United States v. Meade*, 175 F.3d 215, 225-26 (1st Cir. 1999); *United States v. Bostic*, 168 F.3d 718, 722 (4th Cir. 1999); *United States v. Wilson*, 159 F.3d 280, 288 (7th Cir. 1998).

was unconstitutional because it did not require the government to prove that Kafka had actual knowledge that his possession of a firearm was illegal.<sup>82</sup> Kafka argued that the government must prove, as set forth in section 924(a)(2), that he “knowingly” violated section 922(g)(8).<sup>83</sup> However, the Ninth Circuit determined that this knowledge requirement applies only to the *act of possession*—in other words, the government need only prove that the defendant knowingly possessed the firearm, not that he knew of the *illegality of possession*.<sup>84</sup>

Section 922(g)(8) has also been upheld as not violating the Tenth Amendment’s guarantee of state sovereignty.<sup>85</sup> The Tenth Amendment provides that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.”<sup>86</sup> In *United States v. Bostic*, Bostic argued that section 922(g)(8) interfered with West Virginia’s domestic relations laws.<sup>87</sup> The Fourth Circuit began its analysis by citing *United States v. Lopez*, a case decided by the Supreme Court of the United States, noting that, in enacting Section 922(g)(8), Congress acted within its authority under the Commerce Clause.<sup>88</sup> The court then reasoned that section 922(g)(8) posed no affirmative obligation on states; rather, section 922(g)(8) was a constitutional exercise of Congress’s commerce power, thereby “supplementing complementary state legislation.”<sup>89</sup>

Similarly, the Lautenberg Amendment’s retroactive application to convictions both before and after the law’s enactment has been unsuccessfully challenged under the Ex Post Facto Clause.<sup>90</sup> In *United States v. Mitchell*, Mitchell argued that the Lautenberg Amendment violated the Ex Post Facto Clause because both his firearm purchase and underlying misdemeanor domestic violence conviction occurred prior to the provision’s

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82. *Kafka*, 222 F.3d at 1130.

83. *Id.* at 1131.

84. *Id.* (emphasis added).

85. *See, e.g., Bostic*, 168 F.3d at 723-24; *Wilson*, 159 F.3d at 287-88.

86. U.S. CONST. amend. X.

87. *Bostic*, 168 F.3d at 723.

88. *Id.* at 724 (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

89. Specifically, the court stated:

*Bostic* relies primarily upon the Supreme Court’s recent decision in *Printz v. United States* to support his argument that Section 922(g)(8) violates the Tenth Amendment. *Printz* is inapposite to the situation presented in this case. In *Printz*, the Supreme Court held that the Brady Act’s requirement that state officials perform background checks placed an unconstitutional obligation on sovereign state officials. Section 922(g)(8), in contrast, poses no similar affirmative obligation. Instead, Section 922(g)(8) is a constitutional exercise of Congress’s commerce power supplementing complementary state legislation. Accordingly, Section 922(g)(8) does not violate the Tenth Amendment.

*Id.* (internal citations omitted).

90. *See, e.g., United States v. Mitchell*, 209 F.3d 319, 322-24 (4th Cir. 2000).

enactment.<sup>91</sup> However, the Fourth Circuit noted that, to fall within the ex post facto prohibition, a law must apply to events occurring before its enactment and must disadvantage the offender by “altering the definition of criminal conduct or increasing the punishment for the crime.”<sup>92</sup> Regardless of whether Mitchell’s firearm purchase and domestic violence conviction occurred prior to Lautenberg Amendment’s enactment, because the conduct prohibited is the possession of a firearm and Mitchell possessed the firearm after the enactment of the Amendment, the court determined that the statute’s application to Mitchell did not violate the Ex Post Facto Clause.<sup>93</sup>

The Lautenberg Amendment has also been upheld under the equal protection aspect of the Fifth Amendment’s Due Process Clause.<sup>94</sup> In *United States v. Lewitzke*, Lewitzke argued that it was “illogical to preclude all those who have been convicted of domestic violence crimes from possessing a gun, no matter how long ago their offenses may have occurred[,]” and “irrational to single out those who engage in domestic violence for the firearms ban, when those convicted of other violent misdemeanors may be just as likely to misuse their guns.”<sup>95</sup> Lewitzke asserted that the Lautenberg Amendment’s application to him violated his rights afforded by equal protection of the law.<sup>96</sup> The Seventh Circuit, applying a rational basis test, noted that the court need only find “plausible reasons” for the classification in order to uphold it.<sup>97</sup> In finding such reasons, the court called the prohibition “eminently reasonable[,]” reasoning that Congress could reasonably believe that such violent offenders may resort to violence again and that “access to a firearm would increase the risk that they might do grave harm, particularly to the members of their household who have fallen victim to their violent acts before.”<sup>98</sup>

Outside of court, the Lautenberg Amendment has been criticized for effectively removing the exemption that the Gun Control Act of 1968<sup>99</sup> afforded to police and military service members—put simply, even abusers

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91. *Id.* at 322.

92. *Id.* (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)).

93. *Id.* at 322-23.

94. *See, e.g., United States v. Lewitzke*, 176 F.3d 1022, 1025 (7th Cir. 1999).

95. *Id.*

96. *Id.*

97. *Id.* at 1025-26 (quoting *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313-14 (1993)).

98. *Id.* at 1026.

99. *See* 18 U.S.C. § 925(a)(1) (2018), which provides:

(a)(1) The provisions of this chapter, except for sections 922(d)(9) and 922(g)(9) and provisions relating to firearms subject to the prohibitions of section 922(p), shall not apply with respect to the transportation, shipment, receipt, possession, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof. (Emphasis added.)

serving in the military or law enforcement are prohibited from carrying a duty firearm.<sup>100</sup> However, the passage of the Lautenberg Amendment demonstrated that Congress believed there was a greater public interest in protecting vulnerable abuse victims than in placing certain individuals above the law.<sup>101</sup>

## 2. Constitutional Challenges Post-*Heller*

Tracing more recent jurisprudence back to *D.C. v. Heller*, the Supreme Court has very clearly determined that the constitutional right to bear arms is not absolute.<sup>102</sup> In pertinent part, Justice Scalia, writing for the Court, stated:

Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. . . . Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.<sup>103</sup>

Justice Scalia went further, stating, “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”<sup>104</sup>

A mere two years later, in *McDonald v. City of Chicago*, the Court held that the right to keep and bear arms is fully applicable to the States by virtue of Fourteenth Amendment but again emphasized that the right was subject to the States’ reasonable regulation.<sup>105</sup> Justice Scalia’s concurrence is illustrative:

Justice Stevens next argues that even if the right to keep and bear arms is “deeply rooted in some important senses,” the

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100. U.S. DEP’T OF JUSTICE, OFFICES OF THE U.S. ATTORNEYS, CRIMINAL RESOURCE MANUAL: 1117. RESTRICTIONS ON THE POSSESSION OF FIREARMS BY INDIVIDUALS CONVICTED OF A MISDEMEANOR CRIME OF DOMESTIC VIOLENCE (2013), <https://perma.cc/ZE23-QT7G>.

101. See Corbin, *supra* note 35, at 124–25.

102. See *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

103. *Id.* at 626–27.

104. *Id.* at 627, n.26.

105. *McDonald v. City of Chicago*, 561 U.S. 742, 784–85 (2010).



roots of States' efforts to regulate guns run just as deep. But this too is true of other rights we have held incorporated. No fundamental right—not even the First Amendment—is absolute.<sup>106</sup>

While the Lautenberg Amendment's constitutionality under the Second Amendment has not been directly addressed by the Supreme Court, since *Heller* and *McDonald*, lower courts have held the Lautenberg Amendment constitutional under both the Second Amendment and the Equal Protection Clause of the Fourteenth Amendment.<sup>107</sup> The First and Seventh Circuits have held that the Lautenberg Amendment did not violate the Second Amendment on the basis that the Lautenberg Amendment had a "substantial relationship" or was "substantially related" to an "important government objective."<sup>108</sup> The Fourth, Ninth, and Tenth Circuits have upheld the Lautenberg Amendment as not violating the Second Amendment under an intermediate scrutiny analysis.<sup>109</sup> The Ninth Circuit has held that the Lautenberg Amendment does not violate the Equal Protection Clause of the Fourteenth Amendment under a rational basis test.<sup>110</sup> The Eleventh Circuit has upheld the Lautenberg Amendment as a "presumptively lawful longstanding prohibition."<sup>111</sup>

The Supreme Court has, however, interpreted and enforced the Lautenberg Amendment in two recent landmark decisions—*United States v. Castleman*<sup>112</sup> and *Voisine v. United States*.<sup>113</sup> The Lautenberg Amendment originally barred gun possession for any crime of domestic violence but was amended to require the use of physical force in response to the concern that the provision was too broad.<sup>114</sup> The Supreme Court has construed the physical force requirement and "misdemeanor crime of domestic violence" broadly.<sup>115</sup>

In *United States v. Castleman*, Castleman had been previously convicted of misdemeanor domestic assault under a Tennessee statute for knowingly or intentionally causing bodily harm to the mother of his child.<sup>116</sup> Several years later, federal agents discovered that Castleman and his wife

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106. *Id.* at 801-02 (Scalia, J., concurring).

107. See *United States v. Chovan*, 735 F.3d 1127, 1130 (9th Cir. 2013); *United States v. Booker*, 644 F.3d 12, 25 (1st Cir. 2011); *United States v. Staten*, 666 F.3d 154, 167-68 (4th Cir. 2011); *United States v. Skoien*, 614 F.3d 638, 642 (7th Cir. 2010); *United States v. Reese*, 627 F.3d 792, 802-04 (10th Cir. 2010); *United States v. White*, 593 F.3d 1199, 1205-1206 (11th Cir. 2010).

108. *Booker*, 644 F.3d at 25; *Skoien*, 614 F.3d at 642.

109. *Staten*, 666 F.3d at 167-68; *Chovan*, 735 F.3d at 1130; *Reese*, 627 F.3d at 802-04.

110. *Chovan*, 735 F.3d at 1130.

111. *White*, 593 F.3d at 1206.

112. *United States v. Castleman*, 134 S. Ct. 1405 (2014).

113. *Voisine v. United States*, 136 S. Ct. 2272 (2016).

114. *Castleman*, 134 S. Ct. at 1415-16.

115. See *Voisine*, 136 S. Ct. at 2277.

116. *Castleman*, 134 S. Ct. at 1408.

were buying firearms and selling them on the black market.<sup>117</sup> Castleman was charged with two counts of possessing a firearm after being convicted of a misdemeanor crime of domestic violence.<sup>118</sup> Castleman argued that his previous conviction did not qualify as a misdemeanor crime of domestic violence within the meaning of the Lautenberg Amendment because it did not involve “the use or attempted use of physical force.”<sup>119</sup>

The United States District Court for the Western District of Tennessee agreed and dismissed the charges.<sup>120</sup> The district court reasoned that Castleman’s conviction under Tennessee law did not constitute a misdemeanor crime of domestic violence within the meaning of the federal statute because bodily injury may not necessarily involve violent contact and that “physical force” must involve violent contact.<sup>121</sup> A divided panel of the United States Court of Appeals for the Sixth Circuit affirmed on a different basis—the court imported the “physical force” standard for violent felonies under the Armed Career Criminal Act (“ACCA”).<sup>122</sup> The Court then determined that the Lautenberg Amendment required violent force and that Castleman could have been convicted for causing bodily injury by nonviolent force.<sup>123</sup>

The Supreme Court disagreed and reversed, holding that Castleman’s conviction qualified as a misdemeanor crime of domestic violence within the meaning of the federal statute.<sup>124</sup> The Court reasoned that, because the federal statute requires an element of the use of physical force, it includes those convicted of domestic assault under state law.<sup>125</sup> The Court concluded that this reading of the statute is consistent with the common-law meaning of “violence,” and to read it differently would render the federal statute ineffective in many states at the time of its adoption.<sup>126</sup>

Likewise, in *Voisine v. United States*, which involved two separate cases, the Court, relying on statutory interpretation and congressional intent, determined that the Lautenberg Amendment applies to reckless assaults, not

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117. *Id.* at 1409.

118. *Id.*

119. *Id.*

120. *Id.* at 1414.

121. *Id.* at 1409.

122. *Id.*; 18 U.S.C. § 924(e)(2)(B)(i) (2018) is as follows:

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another[.]

123. *Castleman*, 134 S. Ct. at 1409-10.

124. *Id.* at 1415.

125. *Id.*

126. *Id.* at 1410-13.

just knowing or intentional ones.<sup>127</sup> Stephen Voisine was convicted under a Maine assault statute of “knowingly, intentionally, or recklessly caus[ing] bodily injury or offensive physical contact to another person.”<sup>128</sup> Because the assault was committed against his girlfriend, the violation was considered a misdemeanor crime of domestic violence within the meaning of the Lautenberg Amendment.<sup>129</sup> In 2009, Voisine was arrested on unrelated charges.<sup>130</sup> During the course of the investigation, police recovered a rifle from his possession and arrested and charged him with possession of a firearm in violation of federal law.<sup>131</sup>

Similarly, William Armstrong III had been previously convicted of assaulting his wife.<sup>132</sup> In 2010, police searched Armstrong’s residence as part of a narcotics investigation and discovered six guns and a large quantity of ammunition.<sup>133</sup> Like Voisine, Armstrong was charged with possession of a firearm in violation of section 922(g)(9).<sup>134</sup>

Voisine and Armstrong moved to dismiss the charges and argued that a violation of Maine’s assault statute did not constitute a misdemeanor crime of domestic violence under the federal statute because the Maine statute required only “recklessness.”<sup>135</sup> The district court denied the motions, and both men were convicted; the United States Court of Appeals for the First Circuit affirmed.<sup>136</sup> The Supreme Court remanded the case in light of the Court’s decision in *United States v. Castleman*.<sup>137</sup> On remand, the appellate court again held that Maine’s statute constituted misdemeanor domestic violence under the federal statute.<sup>138</sup> The Supreme Court again granted certiorari to determine whether a misdemeanor conviction for reckless domestic assault bars an individual from possessing a gun under section 922(g)(9).<sup>139</sup>

In affirming the circuit court’s decision, the Supreme Court reasoned that Congress intended to prohibit domestic abusers convicted under “run-of-the-mill misdemeanor assault and battery laws” from possessing guns.<sup>140</sup> The Court further reasoned that, because most state statutes include crimes committed with recklessness, construing the federal provision too narrowly by excluding crimes committed with recklessness would substantially

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127. *Voisine v. United States*, 136 S. Ct. 2272, 2277 (2016).

128. *Id.*

129. *See id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 2277-78.

140. *Id.* at 2278.

undermine Congress' intent in enacting the provision.<sup>141</sup> The Supreme Court's acceptance of reasonable regulations of firearms and its broad interpretation of Congress' intent in enacting these particular firearm prohibitions, coupled with the fact that these firearm prohibitions have weathered numerous constitutional challenges, suggest that these particular provisions are here to stay.

### B. Relevant State Bars to Firearm Possession

As mentioned above, the federal government unfortunately does little to enforce its own firearm prohibitions.<sup>142</sup> As a result, the majority of states have passed laws mirroring the federal firearm prohibitions in order to authorize state officials to act when persons violate the state prohibitions.<sup>143</sup> At the state level, 36 jurisdictions<sup>144</sup> have laws that authorize or require courts to prohibit respondents to certain domestic violence-related protective orders from purchasing or possessing firearms, and 29 jurisdictions<sup>145</sup> have laws that prohibit persons convicted of misdemeanor domestic violence offenses from purchasing or possessing a firearm.<sup>146</sup>

### C. Background Checks

The National Instant Criminal Background Check System (NICS) is a set of three databases—the National Crime Information Center, the Interstate Identification Index, and the NICS Index—that are maintained by the Federal Bureau of Investigation (FBI) and that some claim is a “crucial component in the fight against gun violence.”<sup>147</sup> NICS was created to implement the 1993 Brady Handgun Violence Prevention Act, which requires background checks for the sale of firearms through a licensed dealer.<sup>148</sup> The Act does not, however, apply to firearm sales through private

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141. *Id.*

142. Díez, *supra* note 17.

143. *Id.*

144. Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *Domestic Violence & Firearms*, <https://perma.cc/ZG78-79GZ> (last visited Jan. 26, 2018).

145. Alabama, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Maine, Minnesota, Nebraska, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, South Dakota, South Carolina, Tennessee, Texas, Vermont, Utah, Washington, West Virginia. *Id.*

146. *Id.*

147. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *NICS & Reporting Procedures*, <https://perma.cc/BE7M-8F7N> (last visited Jan. 27, 2018).

148. *Id.*

sellers.<sup>149</sup> Since the requirement's enactment, background checks have reportedly stopped 2.4 million felons, abusers, and other dangerous persons from purchasing guns from licensed dealers.<sup>150</sup> In 2010, NICS stopped 117,000 prohibited people who attempted to buy guns from licensed dealers.<sup>151</sup>

Procedurally, to conduct a background check, gun dealers submit a form containing the prospective buyer's name, address, and identifying information such as height, weight, and date of birth.<sup>152</sup> The buyer must also present a valid government-issued photo ID, which the dealer must record on the form before submitting the form to NICS by phone or online via the E-Check System.<sup>153</sup> Dealers must keep these forms for 5 to 20 years, depending on the nature of the transaction.<sup>154</sup> The dealer will receive an instruction to proceed with the transaction, deny the transaction, or delay the transaction for further investigation.<sup>155</sup> If the dealer has not been notified within three business days that the sale would violate federal or state laws, the sale may proceed by default.<sup>156</sup>

Of course, the FBI provides its own records of those who commit federal crimes to the NICS, but the database's records are incomplete because states submit their records on a voluntary basis.<sup>157</sup> States may also require gun dealers to conduct background checks through state or local POCs in addition to background checks through NICS.<sup>158</sup> States that conduct their own background checks through state or local POCs often search records and databases that supplement those required to be searched under the Brady Act.<sup>159</sup> Research indicates that conducting background checks through state

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. 18 U.S.C. § 922(t)(1)(B)(ii) reads:

(t)(1) Beginning on the date that is 30 days after the Attorney General notifies licensees under section 103(d) of the Brady Handgun Violence Prevention Act that the national instant criminal background check system is established, a licensed importer, licensed manufacturer, or licensed dealer shall not transfer a firearm to any other person who is not licensed under this chapter, unless . . .

(B)(ii) 3 business days (meaning a day on which State offices are open) have elapsed since the licensee contacted the system, and the system has not notified the licensee that the receipt of a firearm by such other person would violate subsection (g) or (n) of this section[.]

157. GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, *supra* note 147.

158. *Id.*

159. *Id.*

or local POCs is associated with reduced firearm death rates.<sup>160</sup> Thirteen states use a state or local POC for all firearm transfers.<sup>161</sup> Seven states are partial POC states—for instance, some use state or local agencies to conduct background checks for the purchase of a handgun, while using the NICS for background checks on purchases of long guns.<sup>162</sup> The remaining 30 states and the District of Columbia rely solely on NICS.<sup>163</sup>

#### IV. ARGUMENT

There is no panacea to save victims from abusers, but constitutionally-sound, evidenced-based strategies do exist to reduce the number of domestic violence-related gun deaths. Namely, there are significant gaps in the federal and state statutory provisions that bar domestic abusers from possessing firearms, and there is a general lack of enforcement mechanisms to ensure abusers do not obtain guns or continue to possess guns that they already have.<sup>164</sup> These dangerous gaps and this lack of enforcement pose deadly threats to the most at-risk victims of domestic violence.<sup>165</sup> This note offers six constitutionally-sound, evidence-based proposals intended to extend protection to more victims of domestic violence, prevent more abusers from purchasing firearms, and dispossess abusers of firearms they already have.

##### **A. Broaden the statutory definition of “intimate partner” to include casual dating partners.**

Federal firearm prohibitions, and by extension the state laws that mirror them, protect only a narrowly-defined category of “intimate partner”—specifically, a current or former spouse, a partner with whom the abuser is cohabitating, a parent or guardian, or someone with whom the offender shares a child.<sup>166</sup> Despite the fact that more homicides are

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160. Steven Sumner et al., *Firearm Death Rates and Association with Level of Firearm Purchase Background Check*, 35 AM. J. PREV. MED. 1, 1 (July 2008), [https://www.ajpmonline.org/article/S0749-3797\(08\)00310-3/fulltext](https://www.ajpmonline.org/article/S0749-3797(08)00310-3/fulltext).

161. Full POC states include California, Colorado, Connecticut, Florida, Hawaii, Illinois, Nevada, New Jersey, Oregon, Pennsylvania, Tennessee, Utah, and Virginia. FED. BUREAU OF INVESTIGATION, *NICS Participation Map* (Apr. 2017), <https://perma.cc/TP2F-CA7Q>.

162. *Id.*

163. These jurisdictions include Alabama, Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Mexico, New York, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wyoming. *Id.*

164. See generally Gerney & Parsons, *supra* note 16.

165. EVERYTOWN FOR GUN SAFETY, *supra* note 70, at 2-3.

166. 18 U.S.C.A. § 921(33)(A) (West 2018); BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *supra* note 77.

perpetrated by dating partners than by spouses, casual dating partners are conspicuously left unprotected.<sup>167</sup> To illustrate, if an individual is convicted of an assault against his or her dating partner, provided the couple did not live together, the abusive partner will not be federally prohibited from possessing a firearm.<sup>168</sup> Stated differently, because the assault does not qualify as a misdemeanor crime of domestic violence within the meaning of the federal statute, the abuser will still be able to legally buy and possess a gun.<sup>169</sup>

As a result, many states include a broader category of individuals in their definition of “intimate partner” or “domestic violence.”<sup>170</sup> For example, many states include a broader category of individuals who may apply for the type of protective order that prohibits firearm possession.<sup>171</sup> In fact, about half of the states’ statutes include a former or current dating partner or anyone with whom the victim has had a romantic relationship, any person who is presently or has in the past resided with the victim, and any family member.<sup>172</sup> As stated previously, orders of protection are valuable tools for both victims and law enforcement, both as a means of documenting abusive incidents and police intervening in abusive situations.<sup>173</sup>

Ensuring that all current or former dating partners and parents are protected, regardless of whether they cohabitated with their abusers, would require no new law at the federal level—rather, the federal government, namely the ATF, would merely need to issue clarification that the “similarly situated” language included in 18 U.S.C. section 921(33)(A) includes all current or former romantically-involved partners, regardless of current or previous living arrangements.<sup>174</sup> This clarification would track the modern understanding of domestic assault under VAWA, which includes both current and former spouses as well as current or former dating partners,<sup>175</sup>

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167. EVERYTOWN FOR GUN SAFETY, *supra* note 70, at 7-8.

168. *Id.*

169. *Id.*

170. See GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

171. *Id.*

172. *Id.*

173. See Corbin, *supra* note 35, at 116.

174. BUREAU OF ALCOHOL, TOBACCO & FIREARMS, *supra* note 77.

175. See 18 U.S.C. §2266(7) (2018), which states:

(7) Spouse or intimate partner.—The term “spouse or intimate partner” includes . . .

(A)(i)(I) a spouse or former spouse of the abuser, a person who shares a child in common with the abuser, and a person who cohabits or has cohabited as a spouse with the abuser; or

(II) a person who is or has been in a social relationship of a romantic or intimate nature with the abuser, as determined by the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship[.]

and protect more victims of domestic violence. To this same end, about half of the states' firearm prohibitions should be updated to ensure all victims receive the same protection.<sup>176</sup>

**B. Ensure respondents to temporary orders of protection are barred from possessing guns.**

Typically, when a victim petitions for an order of protection, he or she is granted a temporary order of protection, called an “ex parte order,” which remains in place until a hearing is held and the order of protection is granted or denied.<sup>177</sup> Unfortunately, the federal firearm prohibitions only apply when the protective order is issued after notice to the abuser and a hearing—put more simply, an abuser’s ability to obtain and possess firearms is unaffected by the ex parte order.<sup>178</sup> Because the survivor’s life is in the greatest jeopardy during this period of separation,<sup>179</sup> ex parte orders of protection should not lie outside the scope of section 922(g)(8).<sup>180</sup> However, until Congress amends the statute, states are left to fill this gap.

Some states, such as California, Illinois, Massachusetts, Texas, and West Virginia, extend this prohibition to ex parte orders.<sup>181</sup> For instance, Massachusetts in particular requires a court issuing an ex parte order to order the immediate suspension and surrender of any license to carry firearms or firearms identification card, as well as to order the defendant to surrender all firearms and ammunition to law enforcement officials.<sup>182</sup> Additionally, Massachusetts, Hawaii, New Jersey, and Illinois directly authorize or require police officers to remove firearms and ammunition from abusers subject to protective orders, including ex parte protective orders.<sup>183</sup> These approaches protect vulnerable survivors from abusers while waiting for the order to be granted after a hearing.

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*See also* 18 U.S.C. §2266(10) (2018), which states:

(10) Dating partner.—The term “dating partner” refers to a person who is or has been in a social relationship of a romantic or intimate nature with the abuser. The existence of such a relationship is based on a consideration of—

(A) the length of the relationship; and

(B) the type of relationship; and

(C) the frequency of interaction between the persons involved in the relationship.

176. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

177. *Restraining order*, BLACK’S LAW DICTIONARY (10th ed. 2014).

178. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

179. Mitchell, *supra* note 54.

180. *See id.*

181. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

182. MASS. GEN. LAWS CH. 209A, § 3B.

183. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.



Some may argue that depriving an individual of his or her firearm without notice and a hearing is unconstitutional. However, applying strict protections of procedural due process in a potentially lethal domestic violence situation seems unreasonable in light of how other firearms prohibitions are applied.<sup>184</sup> For example, under section 922(n), a felony indictment causes a firearms prohibition, even though the defendant has not yet been tried and found guilty.<sup>185</sup> Under section 922(g)(3), an individual's status as a drug user can lead to a firearms prohibition, even though his or her status has not been adjudicated.<sup>186</sup> It therefore seems unlikely that federal courts would disturb states' future efforts in this arena.

### C. Include stalking as a prohibiting offense.

Stalking is commonly part of the domestic violence cycle, evidenced by the approximately 66% of female victims of stalking and 41% of male victims of stalking who report that they have been stalked by an intimate partner.<sup>187</sup> Additionally, one study of incidents in ten major United States cities found that nearly 9 in 10 attempted murders of women involved at least one incident of stalking in the year before the attempted murder.<sup>188</sup> Despite that reality, stalking is not a misdemeanor crime of domestic violence within the meaning of the federal statute, even when the perpetrator is an intimate partner of the victim.<sup>189</sup> Similarly, in the vast majority of states, convicted stalkers can still legally buy guns.<sup>190</sup> In fact, a review of conviction records in 20 states showed that there are at least 11,986 individuals across the country who have been convicted of misdemeanor-level stalking but are still permitted to possess guns under federal law.<sup>191</sup> It is therefore likely that there are tens of thousands of additional convicted stalkers who are able to buy guns.<sup>192</sup>

Both Congress and state legislatures should act to ensure that abusers who stalk their partners are barred from obtaining or possessing a firearm.<sup>193</sup> Doing so would allow survivors peace of mind and would allow law enforcement yet another meaningful way to intervene,<sup>194</sup> before it becomes too late.

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184. Tom Lininger, *A Better Way to Disarm Batterers*, 54 HASTINGS L.J. 525, 569 (2003), <https://perma.cc/6DAW-VKEN>.

185. *Id.*

186. *Id.*

187. NAT'L CTR. FOR VICTIMS OF CRIME, STALKING FACT SHEET (Aug. 2012), <https://perma.cc/AW3S-NWQA>.

188. EVERYTOWN FOR GUN SAFETY, *supra* note 70, at 7.

189. *Id.*

190. *Id.*

191. Gerney & Parsons, *supra* note 16, at 3.

192. *Id.*

193. See EVERYTOWN FOR GUN SAFETY, CLOSE THE BOYFRIEND LOOPHOLE (S.1539/H.R. 3207) (n.d.), <https://perma.cc/HW8G-6Z4J>.

194. Corbin, *supra* note 35, at 115.

**D. In states that are reliant only on the federal databases for background checks, implement state or local POCs through which background checks can be conducted.**

The FBI estimates that about 3,000 people pass a background check each year despite being prohibited under state or federal law from purchasing a gun.<sup>195</sup> When a prohibited abuser tries to buy a gun and the NICS runs a background check, the sale will only be stopped if the abuser's record contains sufficient information to indicate that the abuser is prohibited from possessing firearms.<sup>196</sup> Some states have successfully established processes for nearly instantaneously submitting records with sufficient information to the proper databases, but many other states are struggling.<sup>197</sup>

The background check requirement is undermined by states' failure to report to the proper databases abusers who fall within prohibited categories.<sup>198</sup> For instance, one report found that Nevada failed to submit dispositions from 800,000 criminal cases over 20 years.<sup>199</sup> Submission of protective order records to NICS through the National Crime Information Center (NCIC) also varies dramatically by state and locality.<sup>200</sup> A study conducted by the Center for American Progress revealed that while the submission of records regarding convicted domestic abusers to the FBI's NICS Index has increased 132% in recent years, only three states appear to be submitting reasonably complete records: Connecticut, New Hampshire, and New Mexico.<sup>201</sup> Records from these three states account for 79% of the total records submitted to the FBI.<sup>202</sup>

The background check requirement is also undermined when authorities fail to flag records appropriately.<sup>203</sup> States place flags on misdemeanor crimes of domestic violence and domestic violence-related protective orders to indicate that offenders or respondents are prohibited from possessing a firearm under federal law, which indicates to persons running background checks that a firearm sale should be denied.<sup>204</sup> Unfortunately, as mentioned, under federal law, if NICS cannot determine whether a person is prohibited within three days, the dealer may complete the sale even if the

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195. CRIMINAL JUSTICE INFO. SERVS. DIV. OF THE FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, *National Instant Criminal Background Check System (NICS) Operations 2013* (2013), <https://perma.cc/2LRB-VG33>.

196. EVERYTOWN FOR GUN SAFETY, *WHEN DOMESTIC ABUSE BECOMES MURDER: WHAT THE ADMINISTRATION CAN DO TO PROTECT WOMEN FROM GUN VIOLENCE 2* (March 2015), <https://perma.cc/R4DY-FF39>.

197. *Id.*

198. GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE, *supra* note 144.

199. EVERYTOWN FOR GUN SAFETY, *supra* note 196.

200. *Id.*

201. Gerney & Parsons, *supra* note 16, at 3.

202. *Id.*

203. EVERYTOWN FOR GUN SAFETY, *supra* note 196.

204. *Id.*

background check is not complete.<sup>205</sup> In other words, when records are not flagged appropriately or lack sufficient details on which to make a determination about a sale, a time-consuming investigation may have to take place, potentially resulting in an abuser buying a gun after three days by default.<sup>206</sup>

A recent federal report on the NICS found that from 1998 to 2001, 14% of the 200,000 gun purchase denials generated by NICS were the result of domestic violence misdemeanor convictions.<sup>207</sup> During the same period, the ATF received almost 3,000 referrals to retrieve firearms sold by default to buyers convicted of a domestic violence misdemeanor.<sup>208</sup> These sales represented 26% of all referrals to retrieve firearms from prohibited buyers and occurred because authorities did not complete the background check within the federally mandated period.<sup>209</sup>

Inadequate records produced by the courts also undermine the background check requirement.<sup>210</sup> As discussed above, domestic violence records only result in a firearm prohibition if certain criteria under federal law are met, and if courts do not include the information necessary to determine if a conviction or protective order meets those requirements, then background check operators must contact court officials for the missing information.<sup>211</sup> Once again, abusers may be able to buy illegal guns by default.<sup>212</sup>

Several states have laws allowing law enforcement longer than three days to complete the background check, and that is certainly one potential solution to help prevent some default sales to prohibited persons.<sup>213</sup> However, that solution presumes that a background check will eventually yield sufficient information to result in a denial.<sup>214</sup> Such laws would have no impact on those abusers whose prohibited offenses were never properly submitted to or appropriately flagged in NICS and may, therefore, slip through the cracks altogether.<sup>215</sup> For instance, Devin Kelley had no issue purchasing an AR-15, which he used to murder 26 people at a church in Texas, despite that two years prior, an Air Force tribunal convicted him of

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205. *Id.*

206. *Id.*

207. JOHNS HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH, CTR. FOR GUN POLICY & RESEARCH, FACT SHEET: INTIMATE PARTNER VIOLENCE AND FIREARMS 3 (July 2015), <https://perma.cc/WD6C-BUT3>.

208. *Id.*

209. *Id.*

210. EVERYTOWN FOR GUN SAFETY, *supra* note 196.

211. *Id.*

212. *Id.*

213. JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH, *supra* note 207.

214. *See id.*

215. *See generally* GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

assaulting his wife and breaking his stepson's skull.<sup>216</sup> The Air Force acknowledged that Mr. Kelley's domestic violence offense should have prohibited him from purchasing a firearm, but the offense had not been properly entered into NICS.<sup>217</sup>

Unfortunately, case law suggests that requiring states to disclose records to the FBI would violate the Tenth Amendment.<sup>218</sup> In *Printz v. United States*, the Supreme Court considered certain provisions of the Brady Act that obligated local law enforcement officers to conduct background checks on prospective handgun purchasers.<sup>219</sup> In striking down the obligation, the Court held that Congress cannot compel state officials to enact or enforce a federal regulatory program.<sup>220</sup> The appropriate and more effective remedy is, therefore, that states, with federal guidance, voluntarily commit to fully complying with NICS reporting and issue appropriate guidance to localities in order to ensure full and consistent compliance.<sup>221</sup>

Some may argue that this unnecessarily burdens state and local officials; however, consider the convenience to law-abiding citizens attempting to purchase a firearm in exercise of their Second Amendment right. NICS background checks do not create a barrier to the legal sale or transfer of a gun.<sup>222</sup> Quite to the contrary, the "vast majority of background checks are executed during the time it takes for a commercial break."<sup>223</sup> For instance, in 2015, the NICS call centers processed background checks in an average of just over two minutes, and calls that required further investigation were handled in less than eight minutes.<sup>224</sup> The fastest processing time for a background check is through the NICS E-Check System, averaging even less than two minutes.<sup>225</sup>

Finally, states' efforts to comply with NICS reporting could be bolstered by all states eventually implementing their own POCs, rather than relying solely on information contained in the federal databases. This would ensure that the most complete information is available to firearms dealers, thereby reducing abusers' access to firearms and effectively reducing domestic violence-related gun deaths.<sup>226</sup>

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216. Sheryl Gay Stolberg, *Domestic Abusers Are Barred From Gun Ownership, but Often Escape the Law*, N.Y. TIMES, Nov. 6, 2017, <https://www.nytimes.com/2017/11/06/us/politics/domestic-abuse-guns-texas-air-force.html>.

217. *Id.*

218. *See generally* *Printz v. U.S.*, 521 U.S. 898 (1997).

219. *Id.* at 902.

220. *Id.* at 925.

221. *See generally* GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 147.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. Sumner, *supra* note 160.

**E. Require background checks on all gun purchases, including those taking place through private sellers.**

Although federal law requires licensed firearms dealers to perform background checks on prospective purchasers, it does not require unlicensed sellers to do so.<sup>227</sup> An estimated 22% of all firearms transferred in the United States are acquired from unlicensed or private sellers without a background check.<sup>228</sup> The advent of internet sales has further complicated regulation of firearms by significantly increasing illegal buyers' ability to find sellers willing to sell firearms without background checks.<sup>229</sup> For instance, as of September 2013, about 67,000 firearms were listed for sale online from private, unlicensed sellers.<sup>230</sup> Twenty-nine percent of ads by private sellers on armslist.com were posted by high-volume, private sellers who posted five or more ads over an eight-week period.<sup>231</sup> According to an undercover investigation by the City of New York, 62% of private online firearm sellers agreed to sell a firearm to a buyer even after the buyer had told the seller that he or she probably could not pass a background check.<sup>232</sup>

This very problem was exemplified by a violent incident that made national headlines in 2013.<sup>233</sup> Zina Haughton had obtained an order of protection against her husband in October after telling a court that his threats "terrorize[d] [her] every waking moment."<sup>234</sup> Though Mr. Haughton became ineligible to buy a gun under federal law, he was able to skirt the law by purchasing a gun from a private seller online who was not legally required to perform a background check.<sup>235</sup> Mr. Haughton was able to buy a handgun for 500 dollars in the parking lot of a McDonald's, which he used to open fire in the spa where his wife worked, killing his wife and two of her coworkers, injuring four others, and then killing himself.<sup>236</sup>

The lowest hanging fruit to prevent lethal domestic abusers from obtaining firearms is to close the so-called "private sale loophole."<sup>237</sup> The private sale loophole enables many domestic abusers to illegally obtain the

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227. *Universal Background Checks*, GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, <https://perma.cc/GQ6Z-A5R3> (last visited Jan. 26, 2018).

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. See Michael Cooper et al., *Loopholes in Gun Laws Allow Buyers to Skirt Checks*, N.Y. TIMES, Apr. 10, 2013, <https://www.nytimes.com/2013/04/11/us/gun-law-loopholes-let-buyers-skirt-background-checks.html>.

234. *Id.*

235. *Id.*

236. *Id.*

237. See generally Phillip J. Cook, *At Last, a Good Estimate of the Magnitude of the Private-Sale Loophole for Firearms*, ANNALS OF INTERNAL MEDICINE (Jan. 3, 2017), <https://perma.cc/84Z7-K7LW>.

firearms they use against their victims.<sup>238</sup> Nineteen states and the District of Columbia require background checks on private gun sales in at least some circumstances, such as for handguns, or have some sort of state licensing that requires a background check.<sup>239</sup> In states that require a background check for every handgun sale, 38% fewer women are shot to death by intimate partners.<sup>240</sup> However, the other 31 states have no such requirement, and Congress has neglected to act,<sup>241</sup> despite that support for universal background checks has reached an all-time high.<sup>242</sup> A recent poll reports that at least 94% of all voters polled and at least 93% of voters in gun households polled support universal background checks.<sup>243</sup> Congress and state legislatures should act to protect victims of domestic violence.

#### **F. Implement protocols to ensure that abusers relinquish illegal firearms.**

An individual may be prohibited from possessing a firearm, but that does not mean he or she will voluntarily relinquish any firearms in his or her possession upon becoming barred from possession of those firearms.<sup>244</sup> Federal firearms prohibitions do not require domestic abusers to relinquish their firearms once they are convicted of a crime of domestic violence or become a respondent to a qualifying protective order.<sup>245</sup> As a result, abusers continue to commit crimes with guns they are prohibited from possessing under federal and state law.<sup>246</sup> The Law Center to Prevent Gun Violence has deemed this loophole the “relinquishment gap.”<sup>247</sup>

Few state legislatures have taken any meaningful steps toward enforcing state prohibitions by ensuring that individuals give up their firearms upon being convicted of prohibiting crimes or becoming a respondent to a qualifying order of protection.<sup>248</sup> However, some states have enacted legislation that explicitly requires persons prohibited from possessing firearms due to a misdemeanor crime of domestic violence or protective order to surrender firearms already in their possession.<sup>249</sup> These laws put offenders on notice that they are required to relinquish their firearms

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238. See GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

239. Cook, *supra* note 237.

240. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

241. Cook, *supra* note 237.

242. QUINNIPIAC UNIVERSITY, *U.S. Voter Support For Gun Control At All-Time High, Quinnipiac University National Poll Finds; Trump Helped Texas, Florida, Not Puerto Rico, Voters Say*, Oct. 12, 2017, <https://perma.cc/993S-N6H7>.

243. *Id.*

244. Díez, *supra* note 17.

245. GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

246. *Id.*

247. Díez, *supra* note 17.

248. *Id.*

249. *Id.*

within a specified a time.<sup>250</sup> However, with no accountability measures in place, these laws are not worth the paper on which they are written.<sup>251</sup>

Tennessee provides an illustration of this very premise. Relative to orders of protection, pursuant to Tennessee Code Annotated section 36-3-625, judges have a duty to order prohibited persons to relinquish their guns as follows:

a) Upon issuance of an order of protection that fully complies with 18 U.S.C. § 922(g)(8), the order shall include on its face the following disclosures:

(1) That the respondent is required to dispossess the respondent by any lawful means, such as transferring possession to a third party who is not prohibited from possessing firearms, of all firearms the respondent possesses within forty-eight (48) hours of the issuance of the order;

(2) That the respondent is prohibited from possessing a firearm for so long as the order of protection or any successive order of protection is in effect, and may reassume possession of the dispossessed firearm at such time as the order expires or is otherwise no longer in effect; and

(3) Notice of the penalty for any violation of this section and § 39-17-1307(f).

(b) The court shall then order and instruct the respondent:

(1) To terminate the respondent's physical possession of the firearms in the respondent's possession by any lawful means, such as transferring possession to a third party who is not prohibited from possessing firearms, within forty-eight (48) hours;

(2) To complete and return the affidavit of firearm dispossession form created pursuant to subsection (e), which the court may provide the respondent or direct the respondent to the administrative office of the courts' web site; and

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250. *Id.*

251. *See generally* GIFFORDS LAW CTR. TO PREVENT GUN VIOLENCE, *supra* note 144.

(3) That if the respondent possesses firearms as business inventory or that are registered under the National Firearms Act, compiled in 26 U.S.C. §§ 5801 et seq., there are additional statutory provisions that may apply and shall include these additional provisions in the content of the order.

(c) Upon issuance of the order of protection, its provisions and date and time of issuance shall be transmitted to the sheriff and all local law enforcement agencies in the county where the respondent resides.

(d) When the respondent is lawfully dispossessed of firearms as required by this section, the respondent shall complete an affidavit of firearms dispossession form created pursuant to subsection (e) and return it to the court issuing the order of protection.

(e) The affidavit of firearms dispossession form shall be developed by the domestic violence state coordinating council, in consultation with the administrative office of the courts. Upon completion, the form shall be posted on the web site of the administrative office of the courts where it can be copied by respondents or provided to them by the court or the court clerk.

(f) In determining what a lawful means of dispossession is:

(1) If the dispossession, including, but not limited to, the transfer of weapons registered under the National Firearms Act, compiled in 26 U.S. C. §§5801 et seq., that requires the approval of any state or federal agency prior to the transfer of the firearm, the respondent may comply with the dispossession requirement by having the firearm or firearms placed into a safe or similar container that is securely locked and to which the respondent does not have the combination, keys or other means of normal access.

(2) If the respondent is licensed as a federal firearms dealer or a responsible party under a federal firearms license, the determination of whether such an individual possesses firearms that constitute business inventory under the federal license shall be



determined based upon the applicable federal statutes or the rules, regulations and official letters, rulings and publications of the bureau of alcohol, tobacco, firearms and explosives. The order of protection shall not require the surrender or transfer of the inventory if there are one (1) or more individuals who are responsible parties under the federal license who are not the respondent subject to the order of protection.

(g) A firearm subject to this section shall not be forfeited as provided in § 39-17-1317, unless the possession of the firearm prior to the entry of the order of protection constituted an independent crime of which the respondent has been convicted or the firearms are abandoned by the respondent.

(h)(1) It is an offense for a person subject to an order of protection that fully complies with 18 U.S.C. § 922(g)(8) to knowingly fail to surrender or transfer all firearms the respondent possesses as required by this section.

(2) A violation of subdivision (h)(1) is a Class A misdemeanor and each violation shall constitute a separate offense.

(3) If the violation of subdivision (h)(1) also constitutes a violation of § 39-13-113(h) or § 39-17-1307(f), the respondent may be charged and convicted under any or all such sections.

On its face, this statute seems to provide sufficient assurances that prohibited persons will be required to relinquish their firearms.<sup>252</sup> However, Nashville's 2013 Domestic Violence Safety and Accountability Assessment discovered that, in practice, this enforcement scheme is effectively the equivalent of the "honor system."<sup>253</sup> The Assessment found the following:

[C]ourts do not have an effective compliance mechanism through which they can determine (1) if firearms were relinquished; (2) if relinquishment was to a law enforcement entity or an individual (e.g. family member); or (3) if

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252. METRO. GOV'T OF NASHVILLE & DAVIDSON CTY. OFF. OF FAM. SAFETY, *supra* note 39.

253. *Id.*

relinquishment was made to a person legally permitted to possess a firearm.<sup>254</sup>

As of 2016, 11 states explicitly required convicted domestic-violence offenders to surrender their firearms, and 15 states explicitly required respondents to protective orders to surrender their firearms for the duration of the order.<sup>255</sup> That said, by 2016, only Connecticut, Hawaii, Massachusetts, New York, and Pennsylvania had any statutory process for disarming people prohibited from having guns.<sup>256</sup>

Regardless, a recent study showed that state laws that both prohibit the possession of firearms by respondents to a domestic violence-related protective order and require these persons to surrender their firearms are associated with firearm-related domestic homicide rates that are 14% lower than in states without these laws.<sup>257</sup> The authors of the same report posited that there were 75 fewer intimate partner homicides in the United States in 2015 among states with firearm relinquishment laws than would have been expected in the absence of these laws, and that, based on their model, if all 50 states had such laws in place, there would have been an additional 120 fewer intimate partner homicides across the nation in 2015.<sup>258</sup> States must put effective measures in place to ensure that abusers surrender their firearms when ordered to do so.

A way to supplement relinquishment is to require law enforcement officials to remove firearms from the scene of a domestic violence episode, thereby also removing the immediacy of danger posed by a firearm.<sup>259</sup> However, as of 2014, only 12 states had such laws.<sup>260</sup> If the remaining states would implement similar measures and provide law enforcement appropriate training, lives would be saved.<sup>261</sup>

## CONCLUSION

There is clearly no single solution for protecting victims and survivors of domestic violence. Domestic violence is a brutal and complex cycle that is complicated to address. However, a comprehensive scheme of evidence-based, constitutionally-sound approaches can literally be the difference between life and death for many innocent women, children, and other bystanders. It is incumbent upon Congress and state legislatures to work together to achieve meaningful results.

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254. *Id.*

255. Díez, *supra* note 17.

256. METRO. GOV'T OF NASHVILLE & DAVIDSON CTY. OFF. OF FAM. SAFETY, *supra* note 39.

257. Díez, *supra* note 17.

258. *Id.*

259. *Id.*

260. *Id.*

261. *See generally id.*